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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 372

NEW YORK STATE LIQUOR AUTHORITY,

Petitioner,

against

FINN'S LIQUOR SHOP, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

NEW YORK STATE LIQUOR AUTHORITY,

Petitioner,

against

FINN'S LIQUOR SHOP, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Petitioner, the New York State Liquor Authority, prays that a writ of certiorari issue to review the judgment of the New York State Court of Appeals in the case of *In the Matter of the Application of Finn's Liquor Shop, Inc. for an order pursuant to Article 78 of the Civil Practice Law and Rules* v. *State Liquor Authority* (judgment entered April 24, 1969).

Citations to Opinions Below

The opinion of the Appellate Division, First Department, is reported at 31 A. D. 2d 15 and 294 N.Y.S. 2d 592. It is annexed hereto as Appendix "A". The opinion of the New York Court of Appeals is not yet reported. It is annexed hereto as Appendix "B". The order deny-

ing reargument and the motion to amend the remittitur is not yet reported. It is annexed hereto as Appendix "C".

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on April 24, 1969. Reargument and the motion to amend the remittitur were denied on June 4, 1969.

The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

Questions Presented

1. Does the rule enunciated by this Court in *Mapp* v. *Ohio*, 367 U. S. 643 (1961) mandate the prohibition of the use, in administrative proceedings involving possible revocation or suspension of licenses issued by the State for the sale of alcoholic beverages in the exercise of its authority under the Twenty-first Amendment, of evidence obtained in warrantless inspections?

2. Does *Mapp* bar the warrantless inspection of such licensed premises, provided for by New York statute (Alcoholic Beverage Control Law § 105(15), to acquire information as to whether the licensees are complying with the detailed requirements for the sale of alcoholic beverages?

3. Do the standards applicable to criminal proceedings for determining the lawfulness of searches and seizures apply to administrative proceedings?

Statement of the Case

In the instant case, the New York Court of Appeals in a 5-2 decision, overruling prior New York cases, held

that by reason of *Mapp* v. *Ohio, supra*, making applicable to the states the requirements of the Fourth Amendment in criminal proceedings and subsequent decisions of this Court, evidence obtained as a result of a warrantless inspection by investigators of the New York State Liquor Authority could not be relied upon in administrative proceedings involving possible revocation or suspension of a state license to sell alcoholic beverages. The Court rested its decision exclusively on the Fourth Amendment to the Constitution. Petitioner Authority's motion to amend the remittitur was denied on the ground that the Court's opinion "indicates that the questions involving the construction and application of the Constitution of the United States were presented and necessarily passed upon."

Respondent was issued a State license to sell alcoholic beverages several years ago. On January 11, 1967, two investigators of the Authority visited the licensed premises during business hours when the premises were open to the public. The right of the investigators to enter the premises to make an investigation and also to examine the licensee's books and records is set out in the regulatory statute (N. Y. Alcoholic Beverage Control Law §§ 17(7), 105(14) 106(15)). With permission of the store's manager they inspected the licensed premises which consisted of a sales room in front and a rear room. [They also examined books and records.] In the course of such inspection, they discovered material in a coat hanging in the back room, which indisputably would establish violation of a provision of the regulatory statute (§ 100(5)). This violation was the principal basis of subsequent specifications served upon the licensee, which resulted in administrative proceedings followed by a suspension of the license.

There was a second specification of a violation of a rule of the Authority based upon the refusal of the principal

officer to answer questions relating to such misconduct of the licensee (9 NYCRR 531[o], Rule 36, subd. 15). The officer had refused to answer questions in reliance upon the Fifth Amendment to the U. S. Constitution, although he had previously made a written statement acknowledging the licensee's misconduct.

The licensee instituted a proceeding to review a suspension by the Authority. The Appellate Division, in unanimously annulling the suspension held that evidence obtained in the warrantless inspection was illegally seized and therefore was inadmissible in the administrative proceeding. It held also that a statement by the principal officer was the fruit of the illegal seizure and likewise inadmissible. The Appellate Division also rejected the finding of the second specification against the licensee of violation of Rule 36 for refusal to answer questions on the ground that the Authority was provoked to make the inquiry because of information obtained by the unlawful seizure.

The New York Court of Appeals considered the instant case together with two others raising similar questions. The other two cases are not before this Court. The majority held that the function of the exclusionary rule (as determined in the *Mapp* case) was deterrence and that, to the extent that the State could bypass this deterrent effect by using the fruit of an illegal search in a civil or administrative proceeding, the rule's effectiveness was diminished. The opinion stated that, using this rationale, Courts had applied the exclusionary rule "to a variety of proceedings, including those which, at least in form, are not of a criminal character" citing *One Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693, a forfeiture proceeding; *Village of Laurel Hollow* v. *Laverne*, 17 N. Y. 2d 900, a criminal contempt case*; and *Matter of Leogrande* v. *State Liquor Authority*, 25 A. D. 225*, 268 N.Y.S. 2d 433 (1966)

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* The state court decisions in each of these cases was an application of the Supreme Court opinions in *Mapp*.

reversed on other grounds, 19 N. Y. 2d 418, 227 N. E. 2d 302 (1967) a case involving the precise question involved here. The majority regarded the *Plymouth Sedan* case as requiring the result it reached and added that State agencies charged with purely administrative responsibility must conduct their investigative and enforcement functions in compliance with constitutional provisions and more particularly within the confines of the Fourth Amendment. The opinion relied for this proposition on *Camara* v. *Municipal Court,* 387 U. S. 523 (1967) and *See* v. *City of Seattle,* 387 U. S. 541 (1967).

The majority stated that, in the absence of any other means of enforcement, the effect of restricting the applicability would place administrative agencies "beyond the reach of the Constitution". In discussing the particular facts of this case the opinion rejected the argument that the statutory right to inspect licensed premises validated the search in the instant case. It held that such broad statutory authority would be unconstitutional. Again reliance was placed on the *Camara* and *See* cases. The opinion stated that no State may require as a condition of doing business, a blanket submission to warrantless searches at any time and for any purpose. Finally, it held that the licensee was not required to answer questions relating to his sales on credit since the basis for the questions was the product of the unlawful search and seizure.

Judge Jasen, joined by Judge Scileppi, dissented on the grounds that the liquor industry is subject to very strict regulation, and that the licensee by accepting his license, consented to inspections of his premises even though the inspector might not have had probable cause to believe that the law was being violated. In addition, the dissent noted that there was specific consent in this case.

Reasons for Granting the Writ

1. The decision below holding that the exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961) results in the outlawing of all warrantless inspections despite the fact that, in the regulation of traffic in alcoholic beverages the State has mandated and provided for such inspections, is a misconstruction of *Mapp* and the subsequent decisions of this Court. Whether the Fourth Amendment peremptorily bars such inspections as part of the state's regulatory power under the Twenty-first Amendment to the U. S. Constitution is of such substantial importance as to warrant the consideration by this Court.

Mapp in no way bars the use of proof obtained in warrantless inspections of licensed premises. It enunciated a rule of criminal procedure applicable generally in criminal proceedings. See *Johnson* v. *New Jersey*, 384 U. S. 719, 727 (1966). *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693 (1965), also referred to by the New York Court of Appeals involved a forfeiture after criminal proceedings "requiring the determination that the criminal law had been violated" (at 701). This was also the rationale of *Camara* v. *Municipal Court*, 387 U. S. 523 (1967) and *See* v. *City of Seattle*, 387 U. S. 541 (1967), none of which touched upon the state requirements for inspection of licensed premises, especially in the sale of alcoholic beverages reserved for the states under the Twenty-first Amendment. See *Seagram & Sons, Inc.* v. *Hostetter*, 16 N. Y. 2d 47, 209 N. E. 2d 701 (1965), *aff'd.* 384 U. S. 35 (1966).

Investigators of the State Liquor Authority are not authorized under New York's statutes to obtain search warrants in order to make inspections. Their employment is simply in pursuance of the regulatory purpose. Alcoholic Beverage Control Law § 2. The effect of the mandatory application of *Mapp* is to make such inspections impossible

except in instances where a determination is made in advance upon reliable information to use the police to obtain a search warrant.

It is the State's submission that this Court did not intend, by the decisions referred to, to bar such inspections of licensed premises by the Authority's investigators. Our view is supported by the Second Circuit in *Colonnade Catering Corp.* v. *United States,* 410 F. 2d 197 (1969), which held that the prior decisions by this Court did not preclude such warrantless inspections, contrary to the misconstruction of such decisions by the New York Court of Appeals. Indeed, the Second Circuit took occasion to discuss and rely on the New York statute providing for such inspections. Other states have also upheld warrantless inspections of liquor licensed premises. See, e.g., *Solomon* v. *Liquor Control Commission,* 4 Ohio St. 2d 31, 212 N. E. 2d 595 (1965), upholding license revocation; *State* v. *Zurawski,* 89 N. J. Super. 488, 215 A. 2d 564 (1965), aff'd 47 N. J. 160, 219 A. 2d 614 (1966); *State* v. *Meyers,* 376 P. 2d 710, 713 (Idaho 1962).

In the federal courts, inspections of licensed premises pursuant to statutes have consistently been upheld in the case of the sale of alcoholic beverages. *Peeples* v. *United States,* 341 F. 2d 60 (5th Cir. 1965); *United States* v. *Duffy,* 282 F. Supp. 777 (S.D.N.Y. 1968); *United States* v. *Sessions,* 283 F. Supp. 746 (N. D. Ga. 1968); *United States* v. *Two Soaking Units,* 48 F. 2d 107 (2d Cir. 1936); *Plunkett* v. *Callahan,* 46 F. 2d 796 (D.C.N.J. 1931).

The fact that *Mapp* mandated exclusion by the states in criminal proceedings of proof acquired in violation of the Fourth Amendment did not result in the compulsory interdiction of all warrantless inspections by the states of these licensed premises any more than traditionally it barred the use of such inspections by Fedeal inspectors. This is made manifest by the fact that all the cited Federal cases were criminal prosecutions. See also, *Camden County*

Beverage Co. v. *Blair,* 46 F. 2d 648 (D.C.N.J. 1930), a liquor license revocation proceeding.

Throughout the country there is recognition that the liquor business "prone to evils" (*State* v. *Zurawski, supra,* 215 A. 2d at 566), must, in all its aspects be subject to constant close scrutiny and strict regulation. *Childers* v. *Illinois Liquor Control Commission,* 213 N. E. 2d 595 (3d Dist. Ill. 1966). The regular warrantless inspections are a *sina qua non* of such resolution. There is no constitutional prohibition by reason of the Fourth Amendment against the general permission to such inspections provided for by the licensing statutes of New York and the acceptance of the license and similar provisions of the other states which have proceeded by the licensing system rather than the state-operated stores for the sale of alcoholic beverages. See, *Seagram & Sons, Inc.* v. *Hostetter, supra.* New York was justified in reading the Twenty-First Amendment as giving it the overriding responsibility to see to it that licensees are carefully inspected and otherwise regulated and was not precluded from having its investigators enter the premises at all business hours and inspect the public and non-public rooms without prior requirement for warrants showing probable cause.

The New York Court of Appeals overreacted to this Court's recent opinions in believing that this Court's decisior erected since prohibition, so much so that the majority ignored its own decisions such as *Matter of Fortino* v. *State Liquor Authority,* 273 N. Y. 31, 6 N. E. 2d 86 (1936) and *Matter of Okamura* v. *Hostetter,* 20 A. D. 2d 757, 246 N.Y.S. 2d 994 (1964), lv. to app. den. 14 N. Y. 2d 485 which upheld license action following warrantless inspections.

In fact, the decision below squarely conflicts with the rationale of this Court in *Camara* v. *Municipal Court, supra* and *See* v. *City of Seattle, supra.* In *Camara* the Court emphasized the ignorance of the householder and

the criminal penalty attached to even ignorant refusal to permit inspection—factors wholly absent here. The liquor licensee knows when he accepts his license that the entire establishment and his books and records are always open to official inspection to insure that the establishment is being properly operated and that such inspection is not limited to optical observation (387 U. S. at 532). *Colonnade Catering Corp.* v. *United States, supra.* Any requirement for a warrant to validate such inspections would frustrate both the inspections and the State's purpose behind them. *Camara* v. *Municipal Court, supra* at 523. There this Court noted that the question of obtaining a warrant should not even arise until after entry is refused [which was not the case here] and in *See* v. *City of Seattle, supra,* was careful to state that it did not consider inspection for licensing purposes to fall within the scope of its decision (387 U. S. at 545, n. 6).

This Court in *Shapiro* v. *United States,* 335 U. S. 1 (1959), recognized the special treatment required in the regulation of "occupations which are *malum in se* or so closely allied thereto, as to endanger the public health, morals or safety" (at 65) (dissenting opinion).

2. The exclusionary rule of *Map* v. *Ohio* is not applicable to administrative proceedings.

The consistent line of federal cases preceding and succeeding *Mapp* v. *Ohio* upholding use in criminal proceedings of evidence seized by warrantless searches in liquor licensed establishments, the latest being *Colonade Catering, supra,* by the Second Circuit, justify the conclusion that the New York court's effort to equate the administrative proceeding with the criminal proceeding involved in *Mapp* is unwarranted.

Apart from that, the deterrent purpose emphasized in *Mapp* to justify this Court's mandatory application of the exclusionary rule of evidence unlawfully seized does not

warrant such mandatory application to such civil cases as administrative proceedings. The exclusionary rule arose not from the due process clause but from the specific language of the Fourth Amendment which contains no language providing for exclusion. *Irvine* v. *California,* 347 U. S. 128, 147 (1954); *Weeks* v. *United States,* 232 U. S. 333 (1914), and was enunciated to deter unlawful police action. *Linkletter* v. *Walker,* 381 U. S. 618 (1965).

In the exclusion of the evidence in a criminal proceeding, the single prosecution is effected. In an administrative proceeding involving a licensee, the exclusion results in a law violator continuing to operate as a licensee, even though reliable evidence, if admitted, shows without dispute that it is a public danger to permit such person to occupy licensed premises. The broad distinction between the effect of the exclusionary rule to criminal proceedings and administrative proceeding is so marked as to render any attempted equation untenable. License discipline traditionally has not been regarded as a punishment. *Hawker* v. *New York,* 170 U. S. 189 (1898).

The Court of Appeals overlooked this in attempting to equate the economic effect of any license sanction with the penalty following a criminal conviction.

The sweeping ramifications of the decision below for administrative agencies is to bring the broad spectrum to administrative regulation within the far more constricted confines of the criminal law. To wait until there is ample evidence of criminal violation before enforcing an administrative regulation is a wholly unwarranted and undesirable result. This Court has held in many contexts that industries or premises or persons which are subject to scrutiny in certain aspects must provide information relating to that aspect of their activity which is subject to such regulation. See, *e.g., Gardner* v. *Broderick,* 392 U. S. 273 (1968); *Shapiro* v. *United States,* 335 U. S. 1 (1959); see also *Terry* v. *Ohio,* 392 U. S. 1 (1968). The licensee in this case by virtue of his special position, was required to

make the sales records in this case available and to open his premises to inspection by proper authority. In this respect the Fourth and Fifth Amendments to the Constitution require the same result. See *Boyd* v. *United States,* 116 U. S. 616 (1886). The Constitution does not prohibit either the disclosure, for administrative purposes, of documents or of premises. Thus, every liquor licensee operates under an "open door" policy at least when the business is open. See *Ray* v. *United States,* 374 F. 2d 638 (5th Cir. 1967) (licensed small business investment company records subject to examination); *Durovic* v. *Palmer,* 342 F. 2d 634 (7th Cir. 1965), *cert. denied* 382 U. S. 820, applying the Federal Drug and Cosmetic Act (21 U.S.C. § 374[a]).

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated: New York, New York, July 22, 1969.

Respectfully submitted,

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Appendix "A".

SUPREME COURT, APPELLATE DIVISION

First Department, October 1968

HAROLD A. STEVENS, J. P.,
SAMUEL W. EAGER,
GEORGE W. TILZER,
OWEN McGIVERN,
BENJAMIN J. RABIN, JJ.

13817

In the Matter of the Application

of

FINN'S LIQUOR SHOP, INC.,

Petitioner,

For an order pursuant to Article 78 of the Civil Practice Law and Rules against:

STATE LIQUOR AUTHORITY,

Respondent.

Proceeding under Article 78 CPLR (transferred to the Appellate Division of the Supreme Court in the first judicial department by an order of the Supreme Court at Special Term, entered in New York County on December 12, 1967) to review a determination by the respondent suspending petitioner's license and fining petitioner $1,000.

SAMUEL B. WATERMAN for petitioner.

HOWARD HERTZBERG of counsel (Hyman Amsel, attorney) for respondent.

Appendix "A".

LOUIS J. LEFKOWITZ (Samuel A. Hirshowitz and Brenda Soloff with him on the brief), as Attorney General of the State of New York, amicus curiae.

STEVENS, J. P.:

This is an Article 78 proceeding in which petitioner seeks review of a determination of the State Liquor Authority (SLA) which suspended petitioner's license for 10 days, directed that a demand be made on petitioner and its surety on the bond of $1,000 and directed a letter of warning. The proceeding was transferred to this court pursuant to CPLR 7803 and 7804. The central facts are not in dispute.

Petitioner was charged with a violation of section 100, subdivision 5 of the Alcoholic Beverage Control Law for selling liquor on credit without a permit. The second charge was a refusal to answer questions in an interview conducted by SLA January 18, 1967 in violation of Rule 36, subdivision 15 of the Rules of SLA.

At the hearing held on March 28, 1967, a preliminary motion to suppress certain evidence obtained by SLA investigators as having been obtained as the result of an illegal search on January 11, 1967, was denied as being made in the wrong forum. The Hearing Commissioner stated such a motion should be addressed to the Supreme Court. Thereafter Mr. Rownin, an investigator for the SLA, testified that on January 11, 1967, he and Investigator Statruck visited the petitioner's liquor store at 64 West 9th Street. Rownin identified himself to a Mr. Segal, who stated he was the manager of the premises and asked him "to allow me to inspect the premises." Rownin testified Segal said "go ahead, inspect the premises. I must be on duty in the front." Rownin went into the rear room of the premises, saw there a suburban coat hanging on a clothes hanger, searched the pocket of such

coat "and came out with a batch of sales slips from the premises." The witness stated SLA had received a letter to the effect petitioner was selling liquor on credit and evidence of such sales would be found in a coat in the rear room. No search warrant was obtained.

About one or two hours later Martin Finn, an officer, director and stockholder of petitioner to whom the coat belonged, came into the store. In response to questioning by Rownin, Finn identified certain slips as representing sales on credit. Finn also signed a statement prepared by Rownin. Over objection the statement and slips were received in evidence.

Rownin also testified that on the 11th of January he took all slips found in the pocket—those identified as cash as well as credit sales. Finn's request that the cash sales slips be left was refused and he was directed by Rownin to "call me tomorrow and you'll come up and pick them up." Finn did not call the following day but subsequently an appointment was arranged for January 18, 1967. On that date Finn appeared with his attorney, was sworn in, but after consulting with his attorney Finn refused "to answer on the grounds it might tend to incriminate him." It is this refusal which forms the basis for the charge of a violation of Rule 36, subdivision 15. Admittedly there was no stenographer present at the time.

On cross-examination it developed that Rownin also looked through the desks in the rear room, although the books and records had been produced when requested.

In this proceeding petitioner urges there is no evidence to sustain the charge of sales on credit because the supporting evidence was obtained in violation of petitioner's constitutional rights, or was the fruit or result of such violation. SLA asserts there is substantial evidence to support the determinaiton, and the penalty imposed was proper.

Appendix "A".

The *amicus curiae* brief of the Attorney-General asserts the hearing officer properly refused to exclude the evidence and notes whatever might be the personal rights of Finn, the corporation cannot avail itself of the benefit of such personal right of privacy.

SLA has statutory authority "[t]o inspect or provide for the inspection of a premises where alcoholic beverages are manufactured or sold" (Alcoholic Beverage Control Law (ABC), § 17, subd. 7, § 106, subd. 15). Inspection, as the term is generally used, involves a viewing or looking over to ascertain if the premises conform to statutory directives (cf. ABC Law § 106, subd. 9) and embraces as well the right to inspect books and records (*supra*, subds. 12, 15; *Matter of Bareki* v. *State Liquor Authority*, 285 App. Div. 996). A search, on the other hand, involves an examination or seeking out, an exploration in an effort to discover objects or material to be later utilized, presumably, in some form of judicial proceeding. It "implies a prying into hidden places for that which is concealed". (*People* v. *Dozier*, 32 Misc. 2d 631, 633; *cf. United States* v. *Lee*, 274 U. S. 559, 563.)

The right of the people to be secure in their persons, houses and effects against unreasonable searches and seizures has been too long recognized to require extended discussion (U. S. Const., Amend. 4; N. Y. Const., Art. 1, § 12; Civil Rights Laws § 8). The Fourth Amendment is enforceable against the States through the Fourteenth Amendment (*Ker* v. *California*, 374 U. S. 23, 30). It has been held that "except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant" (*Camara* v. *Municipal Court*, 387 U. S. 523, 528-529). It is concluded that this was an unreasonable search.

Segal was the manager of the business only and his permission to inspect the premises could not and obviously

did not confer a right to search the personal property of another lawfully and properly on the premises. This was not an instance where the investigator saw what was in plain sight, but rather involved the ferreting out and removing from the private personal property of Finn, without his consent, certain papers concealed in the pocket of his coat. Under the decisions there can be no doubt that there was an unconstitutional invasion of Finn's personal rights by the search. The more difficult question to be resolved is whether petitioner, a corporation, has standing to object to the procedure.

It has been held that a corporation is entitled under the Fourth Amendment to the protection against unlawful search and seizure (*Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392) and that the protection may extend to commercial premises (*Mancusi* v. *De Forte,* 392 U. S. 364, 367).

In determining whether petitioner is here entitled to avail itself of the benefits of the prohibition certain facts may be re-enumerated in order to bring the issue into sharper focus. Finn was an officer, stockholder and director of petitioner which was the occupant and party in possession of the premises. The coat with its contents was in the custody and safekeeping of petitioner in a portion of the premises not open to the general public. By reason of the search and later utilization of the proceeds of the search petitioner is or will be compelled to suspend its business and forfeit $1,000. As an officer of petitioner, presumably engaged in and dedicated to advancing the interests of petitioner, Finn left his coat and its contents on the premises of petitioner. By reason of the illegal search petitioner will suffer a severe loss detrimental to its interests. Petitioner's protection was infringed by the warrantless seach and seizure. Balancing the need for the search against the invasion and recalling that the SLA had prior information, it not appearing that this was an

emergency, no reason is advanced why a warrant could not have been obtained. Finn was reasonably entitled to expect his personal clothing to be free of a warrantless governmental intrusion (*cf. Katz* v. *United States,* 389 U. S. 349). The property taken was that of petitioner, though in the custody of Finn, and to allow its use here is to allow respondent to profit by its own wrong. It is concluded that petitioner has standing to object to the search and that the evidence should have been excluded (*cf. Mtr. of Leogrande* v. *State Liq. Auth.,* 25 A D 2d 225, rev. on other grounds, 19 N Y 2d 418).

As to the second charge, the privilege against self-incrimination is personal and its use available to natural persons only (*Campbell Painting Corp.* v. *Reid,* 392 U. S. 286, 289; *Hale* v. *Henkel,* 201 U. S. 43, 74). However, the knowledge used by the SLA was gained as the result of an illegal search, and excluding the fruit of the search would have rendered pointless and unnecessary the subsequent interrogation. Moreover, the underlying wrong tainted the later attempted interrogation. Nor was there any waiver for timely objection was made to the use of the material found.

Words ordinarily and generally used are to be given their ordinary meaning, and an enforced or different construction is generally not warranted. The permission granted to inspect the premises, bearing in mind that inspection under the statute (ABC Law) is designed to assure compliance with the statutory mandates, did not embrace a consent to a search of private personal articles. Even the investigator testified this was the first time that he had followed such a course of action though no doubt is entertained the investigator had conducted numerous inspections in the performance of his duties.

The determination appealed from should be annulled, with costs.

All concur.

Appendix "B".

STATE OF NEW YORK COURT OF APPEALS

1. No. 49. 69

In the Matter of
the Application of FINN'S LIQUOR SHOP, INC.,
Respondent,
For an Order &c.
vs.
STATE LIQUOR AUTHORITY,
Appellant.

4. No. 611. 68

In the Matter of
the Application of NICHOLAS LA PENTA, JR., &c.,
Respondent,
For Review &c.
vs.
STATE LIQUOR AUTHORITY,
Appellant.

4. No. 612. 68

In the Matter of
the Application of ANNA MALIK,
Respondent,
For an Order &c.
vs.
NEW YORK STATE LIQUOR AUTHORITY,
Appellant.

FULD, CH. J.:

In each of these cases, the Appellate Division annulled a determination of the State Liquor Authority on the

ground that it was based upon evidence of an illegal search and seizure, and the primary question presented is whether the exclusionary rule of *Mapp* v. *Ohio* (367 U. S. 643) applies to administrative proceedings as well as to criminal prosecutions. We discuss that question before examining the several issues posed by the individual appeals.

The function of the exclusionary rule, as stated by the Supreme Court (*Mapp* v. *Ohio,* 367 U. S., at p. 656), "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." (See, also, *Kaufman* v. *United States,* 394 U. S. ——, ——, 37 U.S.L.W. 4238, 4241 [decided March 25, 1969]; *Lee* v. *Florida,* 292 U. S. 378, 387; *Elkins* v. *United States,* 364 U. S. 206, 217.) To the extent that the State, or its agents, can bypass the deterrent effect of the exclusionary rule by using the fruits of an illegal search in a "civil" or "administrative" proceeding, the incentive for enforcement and investigative personnel to exceed constitutional limitations on their activity remains and the effectiveness of the rule as a deterrent is diminished. Recognizing this, the courts have never hesitated to apply the exclusionary rule to a variety of proceedings, including those which, at least in form, are not of a criminal character. (See *Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693; *Vil. of Laurel Hollow, Inc.* v. *Laverne,* 17 N Y 2d 900; *Matter of Leogrande* v. *State Liq. Auth.,* 25 A D 2d 225, revd. on other grounds 19 N Y 2d 418.) In the *Plymouth Sedan* case (380 U. S. 693, *supra*)—a civil forfeiture suit brought to confiscate an automobile allegedly used for the illegal transportation of alcoholic beverages—the Supreme Court, after noting that the object of the action, "like a criminal proceeding, is to penalize for the commission of an offense against the law" (380 U. S., at 700), went to say (p. 701):

> "It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the il-

legally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible."

The Authority seeks to distinguish the *Plymouth Sedan* case on the ground that its sole function is administrative —the regulation of the liquor industry—and the enforcement of the criminal law is, at most, a peripheral concern.[1] To the extent that this is true, it makes the argument all the more compelling that, if the exclusionary rule is to be effective, it may not be limited to purely criminal proceedings. It is no longer subject to question that State agencies, charged with purely administrative responsibilities, just as those engaged in the enforcement of the criminal law, must conduct their investigative and enforcement functions in compliance with the constitutional requirements and, more particularly, within the confines of the Fourth Amendment. (See *Camara* v. *Municipal Court*, 387 U. S. 523, 530-531; *See* v. *City of Seattle*, 387 U. S. 541.)

Claiming that adequate protection of Fourth Amendment rights is assured if illegally obtained evidence is not admissible in criminal prosecutions, the Authority urges that

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[1] We would note, that, although the Alcoholic Beverage Control Law—the enforcement of which is the primary responsibility of the Authority—is essentially a remedial and regulatory statute, the violation of any of its provisions is punishable as a misdemeanor (Alcoholic Beverage Control Law, § 130). Moreover, in addition to its power to revoke, suspend or cancel licenses, which might be considered to be purely administrative remedies (§ 118), the Authority may also recover a bond claim, in an amount which is specifically delineated by statute as a "penal" sum" (§ 112). Indeed this purely "penal" sanction was actually imposed in two of the three cases presently before us. (See *Matter of Finn's Liquor Shop* v. *State Liquor Authority, infra; Matter of Malik* v. *State Liquor Authority, infra.*)

the exclusionary rule should not be extended to administrative proceedings. In the absence of any other means of enforcement, however, the effect of such a restricted application of the rule would place the agency beyond the reach of the Constitution and there would be no way to protect licensees from abuse and harassment at the hands of its employees or agents.

In *Matter of Leogrande* v. *State Liq. Auth.* 25 A D 2d 225, revd. on other grounds 19 N Y 2d 418, *supra*); the Appellate Division had annulled the Authority's determination that the licensee had used his premises for gambling activities, on the ground that the evidence upon which the determination was based was illegally obtained. The Appellate Division expressed its rationale in persuasive terms: "All of the reasons in policy which suggest the application of the exclusionary rule to illegal searches and seizures by public officers in criminal proceedings", Judge Breitel, writing for the court (25 A D 2d, at pp. 231-232) declared, "apply equally to administrative proceedings of thee preesnt character, namely those involving penalties, forfeitures, or other sanctions for the violation of law or regulation. * * * The exclusionary rule rests on a theory of deterrence; that policy would not be served if the illegal official activity could be used, despite unavailability in criminal proceedings, to effect parallel sanctions of forfeiture in an administrative proceeding." The Court of Appeals reversed—but on the very different ground that the petitioner had failed to raise the question before the Authority and had thereby not preserved it for review.

The Authority contends that the Appellate Division's decision in *Leogrande* was inconsistent with our holding in *Sackler* v. *Sackler* (15 N Y 2d 40). Although we did, in *Sackler*, permit the use of unlawfully obtained evidence in a civil suit, we based our conclusion solely on the ground that the unlawful entry was committed by *private individuals* as opposed to *representatives of Government* and

that, in the absence of State action, there was no constitutional violation involved. The Court's opinion in *Sackler* expressly noted that the decision would not be controlling in a case where the evidence was illegally obtained "by governmental people" (15 N Y 2d, at p. 44; see, also, *People* v. *Horman*, 22 N Y 2d 378, 381-382).

The Authority, just as any other State agency, is obligated to conduct its activities in conformity with the demands of the Constitution. When its agents exceed those limits, it should not be permitted to avail itself of the fruits of such unlawful activity in order to impose sanctions upon the persons whose constitutional rights have been violated.

With this principle in mind, we proceed to a discussion of each of the three cases before us.

Matter of Finn's Liquor Shop v. *State Liquor Authority.*

Acting on a tip that sales were being made on credit, two inspectors from the State Liquor Authority entered Finn's Liquor Shop, in New York City, on a January day in 1967, and asked the store manager, the only person present, if they could inspect the premises. When the manager told them to "Go ahead," one of the inspectors went immediately to a room in the rear of the liquor store where a coat was hanging. Without bothering to ascertain its ownership, the inspector went through the pockets of the coat and found sales slips indicating that sales had been made, impermissibly, on credit.

The licensee's principal—Martin Finn—arrived at the premises shortly thereafter and, when confronted with the slips which the investigator had seized, he admitted that they were used for sales on credit. Finn was called to the offices of the Authority a week later for further questioning but, upon the advice of counsel, refused to answer any

questions on the ground that to do so would incriminate him. Charges were filed against the petitioner, alleging that he had sold liquor on credit and had refused to answer questions in an investigation conducted by the Authority (Alcoholic Beverage Control Law, § 100, subd. 5: Rules of the State Liquor Authority, Rule 36, subd. [o]). At the commencement of the hearing on those charges, the petitioner requested that all of the evidence resulting from the search of the coat be suppressed as unlawfully obtained. The hearing officer, relying on the *Leogrande* case (25 A D 2d 225, *supra*)—which had not yet reached our court—agreed that the illegally seized evidence was inadmissible. However, voicing the opinion that he lacked jurisdiction to pass upon the constitutional question, he declined to suppress the evidence and suggested that the petitioner address his application to the Supreme Court. Relying upon the sales slips, Mr. Finn's admission as to their purpose and his subsequent refusal to answer questions, the Authority ordered a 10-day suspension of the license, a $1,000 bond forfeiture and the issuance of a letter of warning.

The petitioner thereupon instituted this article 78 proceeding in which it renewed its claim that the evidence was the product of an unlawful search and seizure and, for that sion, First Department, unanimously sustained the petition and ordered that the Authority's determination be annulled. On appeal to our court, the Authority argues (1) that, as already indicated, the exclusionary rule does not apply to administrative proceedings; (2) that the evidence was obtained during the course of an authorized adminisreason, could not be used against it.[2] The Appellate Divi-

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[2] Although the hearing officer ruled that he lacked the jurisdiction to pass upon the constitutional question—a conclusion with which we agree (see, *infra*, p. 11, n. 5; p. 13)—the circumstances of the search were fully explored in the record and the question was adequately preserved for review in the article 78 proceeding.

trative inspection and involved no Fourth Amendment violation; and (3) that, in any event, the refusal by Finn to answer questions a week after the sales slips were found was not a fruit of the search and seizure and was sufficient, in itself, to support its determination.

We have already declared that, when the search was undertaken in violation of the Fourth Amendment, the exclusionary rule applies and the evidence may not form a predicate for the imposition of penalties. It is, therefore, necessary to determine whether, in fact, any such constitutional violation occurred in this case. The Authority maintains that it had a *statutory* right to make an administrative inspection of the licensed premises, that this included all items of personal property, such as the coat in the rear room, and that the exercise of this right was consistent with Fourth Amendment protections.

It should be pointed out, at the outset, that it is not at all clear that the Authority has the broad statutory power, which it claims, to conduct investigation of the premises of licensees for off-premises consumption.[3] Moreover, it is highly doubtful that an inspection of the "premises" would include an article of personal property—not used in the conduct of the business and whose ownership was not known. What is even more significant is that such a broad grant of statutory authority to conduct warrantless searches would be unconstitutional. (See *See* v. *City of Seattle,* 387 U. S. 541, *supra;* see, also *Camara* v. *Municipal*

[3] Although subdivision 7 of section 17 of the Alcoholic Beverage Control Law appears to give the Authority the right to inspect "any premises where alcoholic beverages are manufactured or sold," subdivision 15 of section 105, which specifically governs a licensee to sell for consumption off the premises, requires only that *"books and records"* be made available for inspection. In contrast, subdivision 15 of section 106, governing licensees who sell for "on-premises consumption," expressly grants the right to inspect the *"licensed premises."*

Court, 387 U. S. 523, *supra*.) In *See* (387 U. S. 541, *supra*), the Supreme Court invalidated a local ordinance which, similar to the provisions relied upon by the Authority, required owners of business establishments to permit administrative inspections of their premises without a warrant. The court held that, with respect to those portions of business property not open to the public, the Fourth Amendment protections apply. In reaching that conclusion, the court declared (p. 543):

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant."

Although the court did indicate that the Constitution might not inhibit certain narrowly defined inspection procedures, the implication of the decision in the *See* case is clear. No State may require, as a condition of doing business, a blanket submission to warrantless searches at any time and for any purpose. Applying this principle to the present case, it follows that the investigator's entry into the back room of the store and, particularly, his search of the coat may not be constitutionally justified.[4]

The Authority also contends that, since the petitioner's refusal to answer questions was not the product of the

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[4] In point of fact, although the Authority's hearing officer declined to suppress the evidence, he recognized that the search in this case far exceeded the scope of the normal administrative inspection, stating that he was "flabbergasted that this investigator should go into property and search a coat, whether it is on a hanger or on a person's back, without permission or without color of right or without a search warrant."

search, this was a sufficient basis, in and of itself, for its determination. Although it is difficult to see how a provision which imposes penalties for refusing to answer questions may be consonant with the requirements of the Fifth Amendment, we need not here confront that problem. The Appellate Division found, and there is no evidence to the contrary, that "the knowedge used by the Authority was gained as a result of an illegal search and excluding the fruit of the search would have rendered pointless and unnecessary the subsequent examination." No basis exists for disturbing the conclusion reached below that the questioning of Finn, like all of the other items in evidence, was the product of the unlawful search and seizure, and that the Authority's determination, grounded on such evidence, must fall.

Matter of La Penta v. *State Liquor Authority.*

This petitioner holds a hotel liquor license. After intercepting his telephone conversations for a month—pursuant to an ex parte eavesdropping order—the police obtained a warrant to search his home, where they found various apparatus used for gambling. He was thereafter charged with a crime and, on his application in the course of that criminal prosecution, the County Court found that the order authorizing the wiretaps had been improperly issued and directed that the resulting evidence be suppressed. The Authority then instituted a proceeding for the cancellation of his license. Upon the hearing which it conducted, the Authority received, over objection, that very same wiretap evidence, concluded that the petitioner was of unfit character and ordered that his license be cancelled. The Appellate Division, Fourth Department, annulled the deetermination.

Although the applicability of the *Mapp* rule to administrative determination was argued in this case, as in the

others, there exists, wholly apart from the requirements of the Federal Constitution, an explicit statutory prohibition against the use in any proceeding of evidence procured through illegal wiretaps. CPLR 4506 provides, in so many words, that evidence obtained by any act of eavesdropping in violation of the applicable statutes and evidence obtained through or resulting from information obtained by any such act, "shall be inadmissible for any purpose in any civil or criminal action, proceeding or hearing." Despite this express prohibition, the Authority argues, the petitioner failed to properly raise the question and it was, therefore, privileged to accept and consider such evidence.

The fact is that the petitioner did object to the admission of the evidence but the Authority insists that the objection was insufficient and contends that, in addition to his objecting and furnishing a copy of the County Court's order suppressing the evidence, he should have presented proof to support his position that the eavesdropping order was invalid and the search and seizure unlawful. More specifically, the Authority—noting that it is in no way associated or connected with the District Attorney's office—argues that, in the absence of privity, it cannot be bound by an order issued in a criminal proceeding to which it was not a party. In short, says the Authority, since it was free to disregard the court's order, the petitioner was obliged to produce, at the administrative hearing, independent proof that the wiretaps were, in fact, illegal and that he had standing to object to their use.

This argument stems from a misapprehension of the Authority's function. Although it has broad powers in its own sphere, it has never been given the authority to determine whether sufficient grounds exist for the issuance of a search warrant or an ex parte eavesdropping order. Manifestly, such a decision must be made, in the first instance, by a court and, presumably, only a court may

review it.[5] Certainly, when a magistrate, issuing such an order, has been reversed by a superior tribunal, the Authority may not continue to treat the lower court's order as valid and act upon it. The impropriety of permitting the agency to pass upon the validity of the search is illustrated by the facts of this case. Absent valid warrant, the search of the petitioner's home and the seizure of the property were unlawful. Once the Authority was presented with the County Court's order, which voided the eavesdropping order and the later issued search warrant, there was no possible basis upon which the search could be sustained as lawful. Since, in the absence of judicial sanction, the search was unlawful *per se*, there is not the slightest justification to require the petitioner to litigate the question anew before the administrative agency.

Simply put, the evidence against this petitioner, having been obtained through the use of an ex parte eavesdropping order which was invalidated by competent judicial authority, was inadmissible for any purposes. The Authority's determination based upon such evidence was, therefore, properly annulled.

Matter of Malik v. *State Liquor Authority.*

In the Fall of 1966, two police officers, while in petitioner's bar in the City of Buffalo, observed two customers reading from a racing form and making notations on slips of paper. They saw each of the men take a sheet of paper,

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[5] In this regard, it is interesting to compare the Authority's position in the present case with the view expected by the hearing officer in the *Finns Liquor Shop* case. In *Finn's Liquor Shop*—which was located in Manhattan—the hearing officer declined to pass upon the licensee's request to suppress the evidence, observing that, as a mere administrative official, he lacked the power to make a determination of the contitutional question. He suggested that the licensee apply to the Supreme Court for an order to suppress, with which he would then comply. In the present case—involving a hotel in Syracuse—the court granted the requisite suppression order but the Authority refused to accord it any weight.

fold a dollar bill inside it and hand it to the petitioner who was tending bar. One of the officers arrested her and seized the papers, which appeared to be betting slips. The officer then proceeded to search the kitchen, in the rear of the premises, where he found various records and material used in bookmaking.

The City Court of Buffalo—in which criminal charges were brought against the petitioner—found, on a motion to suppress evidence, that there was no probable cause to arrest her and ordered that the betting slips and the evidence found in the kitchen be suppressed. At a subsequent hearing before the Liquor Authority, that court order was brought to the attention of the hearing examiner but the items "suppressed" were, nevertheless, received in evidence. The Authority, on the strength of such proof, decided that the petitioner violated the Alcoholic Beverage Control Law (§ 106, subd. 6)—in that she suffered or permitted gambling on the premises—suspended her license for 10 days and imposed a bond claim in the penal sum of $1,000. The petitioner brought this article 78 proceeding to review the determination, and a divided Appellate Division annulled the Authority's order on the ground that it was based upon evidence which had already been found to be illegally obtained.

Although all of the arguments raised on this appeal have already been considered in connection with the other cases, there is one factual difference in the present case which merits further discussion. In *La Penta*, the search and seizure could only have been sustained if the search warrant was valid. Thus, the earlier court decision, invalidating the warrant and the ex parte eavesdropping order upon which it was based, rendered the unlawfulness of the search self-evident. In the present case, however, some of the evidence was obtained pursuant to a search which was incidental to an arrest and, hence, did not require prior judicial sanction. Nevertheless, the Authority was not permitted to disregard a court determination (in

the criminal case that the evidence was, in fact, the fruit of an illegal search and seizure. The Authority has given no adequate reason why it should be allowed to reexamine the issue of the legality of a search after a court has already decided the question. The agency merely asserts that it has no association with the District Attorney's office and thus should not be concluded by a decision in a case in which it was not a party. Although the two agencies may be treated, for other purposes, as independent parties, this can hardly be the case where they are both seeking to use the same police officials as their agents to gather evidence. If the search and seizure was unconstitutional to the extent that it was performed for the benefit of the prosecutor, the same act could hardly be considered lawful for the Authority's purposes. Since the facts and the issues are the same, the decision on the motion to suppress that the search and seizure was unconstitutional should be determinative of the issue. Such a decision is, of course, reviewable through the normal appellate process but neither the administrative hearing nor an action under article 78 to review it constitutes an appropriate proceeding to pass upon the propriety of a judicial decision which has never been directly challenged.

In sum, in each of these three cases, the evidence relied upon to support the Authority's determination was found to have been obtained in violation of the petitioner's Fourth Amendment rights. The logic of the *Mapp* rule, which requires the exclusion of such evidence in order to deter State officials from engaging in unlawful searches and seizures, applies equally whether the evidence is sought to be used in a criminal trial or on an administrative hearing. There can be no justification for any State agency, charged with enforcement of the law, to rely, in fulfilling its function, upon the unlawful and unconstitutional acts of its agents.

In each case, the order appealed from should be affirmed, with costs.

Appendix "B".

Matter of Finn's Liquor Shop, Inc., For an Order &c. v. State Liquor Authority.

JASEN, J. (dissenting):

The Alcoholic Beverage Control Law requires the licensee to keep "adequate books and records of all transactions." (§ 105, subd. 15.) "Such books and records shall be available for inspection by any authorized representative of the liquor authority" (§ 105, subd. 15) and the State Liquor Authority has the general power "[t]o inspect or provide for the inspection of any premises where alcoholic beverages are manufactured or sold." (§ 17, subd. 7.)

Here, the Authority's investigators entered the licensed premises during business hours and received permission to inspect the premises and the books and records. It was during this authorized inspection that one of the investigators found, in a coat hanging in the back part of the licensed premises, the sales slips indicating that sales on credit were made by the licensee in violation of Alcoholic Beverage Law section 100.

The majority have held that these sales slips were unlawfully seized and could not be used as evidence in any proceeding instituted by the Liquor Authority against the licensee.

I disagree with this view.

There can be no doubt that the liquor industry is of a peculiar genre, having an inordinately strong effect on our State's public health, welfare and morals, and it must of necessity be strictly controlled.

We recognized the right of the State to restrict, regulate and control every facet of this industry in *Seagram & Sons* v. *Hostetter* (16 N Y 2d 47), where we said:

> "A long history of regulation, control, price fixing, place of time and sale setting, and outright extinction

lies behind the liquor business in this country since Colonial times, and it is too late today to suggest that the rights of those who choose to engage in it are on a constitutional or legal parity with the rights of people who trade in bicycles, or cosmetics, or furniture." (*Id.*, at 56.)

Indeed, as the dissenting opinion in that case noted:

"No one will question the traditional rights of the States * * * under their inherent police power to prohibit, restrain or regulate the manufacture, sale and use of intoxicants (citations omitted). The New York Legislature has power to enact a variety of laws calculated to suppress intemperance or to minimize the known evils of the liquor traffic, since the trade is one as to which there is a recognized public interest. But 'police power' is not a magic incantation to frighten off judicial investigation into the constitutionality of statutes. The State of New York could completely outlaw the sale of liquor but, having chosen instead to regulate it, the restrictions and requirements can be such only as are necessary to protect public safety, health and morals from the evils, known or apprehended, of the trade." (*Id.*, at 61.)

Rather than choosing to prohibit the sale of liquor by individuals as some states have done, New York has elected to license persons to engage in the liquor business. However, in order to protect the public from the many evils which that trade may generate, the State has declared certain transactions, such as the retail sale of liquor on credit, to be illegal. To enforce these regulations, the Liquor Authority was granted the right to make unannounced inspections of licensed premises. I believe that by requesting the privilege to dispense liquor, the licensee implicitly

consents to such regulations and inspections and makes a limited waiver of his Fourth Amendment rights. (*Manchester Press Club* v. *State Liquor Comm.*, 89 N. H. 442, 200 A. 407, 116 A.L.R. 1093; *Oklahoma Alcoholic Beverage Control Bd.* v. *McCullery*, 377 P 2d 568 [Okla., 1963]; cf. *Brown* v. *State*, 391 S. W. 2d 425 [Tex. Crim. App., 1965].)

The right to inspect is not merely confined to optical observation of areas open to the public. (*Oklahoma Alcoholic Beverage Control Bd.* v. *McCullery, supra; Silber* v. *Bloodgood*, 177 Wisc. 608, 188 N. W. 85 [1922]; see also, *Martin* v. *Reynolds Metals*, 297 F. 2d 49, 57 [9th Cir., 1961].)

Thus, in *Matter of Fortino* v. *State Liquor Authority* (273 N. Y. 31 [1936]), the Authority inspector, in the course of the inspection provided for by the statute, found contraband liquor under straw in a kennel attached to the licensed premises. Yet this court upheld disciplinary action. The same result was reached in *Matter of Okamura* v. *Hostetter* (20 A D 2d 757 [1st Dept., 1964], lv. to app. den. 14 N Y 2d 485 [inspection of kitchen, storeroom, dining room and an area claimed by the licensee to be his personal living quarters]).

Considering the peculiar nature of the liquor industry, I believe that evidence discovered during administrative inspections of licensed premises may be used in an administrative hearing even though the inspector may not have possessed probable cause to believe that a violation of the Alcoholic Beverage Control Law was being committed upon the premises. Additionally, where, as here, consent was given for the inspection, I do not believe a constitutional problem is even presented. (Cf. *Camara* v. *Municipal Court*, 387 U. S. 523; *See* v. *City of Seattle*, 387 U. S. 541.)

I submit that the broad language of the majority goes far beyond reasonable constitutional requirements and will seriously hamper reasonable regulation of the liquor industry.

Appendix "B".

For the foregoing reasons, the order of the Appellate Division should be reversed and the order of the State Liquor Authority suspending petitioner's license reinstated.

* * * * * *

In the *Matter of Finn's Liquor Shop, Inc.*, v. *State Liquor Authority:*

Order affirmed, with costs. Opinion by Fuld, Ch. J. All concur except Jasen, J., who dissents and votes to reverse in an opinion in which Scileppi, J., concurs.

In the *Matter of La Penta, Jr., &c.* v. *State Liquor Authority:*

Order affirmed, with costs. Opinion by Fuld, Ch. J. All concur.

In the *Matter of Malik* v. *State Liquor Authority:*

Order affirmed, with costs. Opinion by Fuld, Ch. J. All concur.

Appendix "C".

Mo. No. 623

In the Matter of the Application

of

FINN'S LIQUOR SHOP, INC.,

Respondent,

For an Order Pursuant to Article 78 CPLR,

vs.

STATE LIQUOR AUTHORITY,

Appellant.

Motion for reargument denied.

Motion to amend the remittitur denied upon the ground that the opinion of the Court of Appeals (24 N. Y. 2d ——) [decided April 25, 1969] indicates that the questions involving the construction and application of the Constitution of the United States were presented and necessarily passed upon.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 372

NEW YORK STATE LIQUOR AUTHORITY,

Petitioner,

—against—

FINN'S LIQUOR SHOP, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

The petition should be denied because it does not establish that there is a Federal question of substance involved, or that the decision of the court below is not in accord with the decisions of this Court.

Statement of the Case

The facts are concisely stated in the opinion of the Court below (Pet. 11A-13A). Respondent had been licensed for several years by Petitioner to sell alcoholic beverages at retail for off-premise consumption, as distinguished from the sale of such beverages by hotels, restaurants and bars for on-premise consumption (Pet. 13A, see note 3). Having

been informed that evidence of sales on credit by Respondent, in violation of law, was in a coat in the rear of Respondent's store, Petitioner sent two investigators to the premises on January 11, 1967 to obtain the evidence. After the store manager, in answer to their request to inspect the premises, told them to "Go ahead" one of them went to the non-public part in the rear of the premises, searched a coat hanging there, and took therefrom sales slips indicating sales on credit.

Upon these facts, the Court below found that the search was unconstitutional, that it was not an inspection (Pet. 14A, note 4), that the claimed statutory power to inspect, even if applicable here, was so broad that it was unconstitutional, and that evidence obtained by means of an illegal search was excludable in an administrative hearing as much as in a criminal trial. It excluded the evidence and affirmed the reversal of Petitioner's determination which was based on such evidence.

Questions Presented

Petitioner posits the questions in its petition on an assumption of fact contrary to the findings of the Court below and on a statement of law concerning the legal determination made below which does not represent the holding of the Court below. The fact is that this case does not involve a regulatory inspection of a licensed business to acquire information of non-compliance with law, as repeatedly alleged in the petition; but involves a warrantless search of a coat hanging in the non-public part of respondent's business, made as the result of prior information given to petitioner that evidence would be found in the coat

showing sales on credit in violation of law (Pet. 3A-5A, 11A).

The Court below did not hold that *Mapp* v. *Ohio* (1961), 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, mandated or compelled the legal conclusions reached, as alleged in the petition, but the Court only applied the principles enunciated in *Mapp,* and other cases decided by this Court, to the facts herein, in order to make the determination stated in the last paragraph of its opinion. The Court said (Pet. 19A):

> "In sum, in each of these three cases, the evidence relied upon to support the Authority's determination was found to have been obtained in violation of the petitioner's Fourth Amendment rights. The logic of the *Mapp* rule, which requires the exclusion of such evidence in order to deter State officials from engaging in unlawful searches and seizures applies whether the evidence is sought to be used in a criminal trial or on an administrative hearing. There can be no justification for any State agency, charged with enforcement of the law, to rely, in fulfilling its function, upon the unlawful and unconstitutional acts of its agents."

Analysis of Petitioner's arguments (Pet. 6-11) indicates that it claims that the Twenty-first Amendment to the United States Constitution grants the State authority to regulate the sale of alcoholic beverages; that such regulatory function requires the State to make warrantless inspections; that any evidence obtained as the result thereof should not be excluded for any reason in administrative hearings because the strictures imposed by the cases interpreting the Fourth Amendment apply only to criminal cases; that the standards developed in criminal cases to determine the lawfulness of a search and seizure should not be applied in administrative proceedings.

These arguments raise no Federal question of substance and do not show that the determination of the Court below was not in accord with the decisions of this Court.

The Writ Should Be Denied

1. In *See* v. *City of Seattle* (1967), 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943, this Court followed its previous decisions (see, *supra*, 387 U.S. 543, 87 S. Ct. 1739, 18 L. Ed. 2d 946) holding that the protection of the Fourth Amendment against unreasonable searches and seizures applied to commercial as well as residential premises. This Court then held that warrantless code enforcement inspections of commercial premises were barred by the Fourth Amendment in accordance with its determination made the same day for residential premises; citing *Camara* v. *Municipal Court* (1967), 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930. *Camara* and *See* established that administrative entry to either non-public commercial or residential premises could be compelled only by warrant. Both cases involved criminal trials for refusal to permit regulatory inspection by administrative agencies granted broad authority to do so by statute, but the discussion of the protection of the Fourth Amendment in no way indicated a limitation of such protection only to criminal proceedings.

The Court of Appeals below applied the principles enunciated in *See* to the facts it found herein and decided that the investigator's search of the coat hanging in the non-public portion of the respondent's business, made without a warrant, was illegal. It said (Pet. 14A):

> "Although the court did indicate that the Constitution might not inhibit certain narrowly defined inspection

> procedures, the implication of the decision in the *See* case is clear. No State may require, as a condition of doing business, a blanket submission to warrantless searches at any time and for any purpose. Applying this principle to the present case, it follows that the investigator's entry into the back room of the store and, particularly, his search of the coat may not constitutionally be justified."

The finding of the Court below that the warrantless search was unlawful cannot be challenged and is in accord with the decisions of this Court. *Camara, supra,* 387 U.S. 528, 87 S. Ct. 1730, 18 L. Ed. 2d 935. Petitioner does not dispute this but argues that the determination that evidence found in an unlawful search is excludable in an administrative hearing results in the "outlawing of all warrantless inspections."

2. The determination of the Court below that the Fourth Amendment barred the use in an administrative proceeding of evidence secured in an unlawful search is not contrary to but is in accord with the latest decisions of this Court. *One 1958 Plymouth Sedan* v. *Pennsylvania* (1965), 380 U.S. 693, 696-698; 85 S. Ct. 1246, 1248-9; 14 L. Ed. 2d 170, 172-3; *Boyd* v. *United States,* 116 U.S. 616, 6 S. Ct. 524; 29 L. Ed. 746; *See* v. *City of Seattle, supra,* 387 U.S. 543-545, 87 S. Ct. 1739-40, 18 L. Ed. 2d 946-7. *Boyd* and *Plymouth Sedan* were forfeiture cases, i.e., civil proceedings which held that the Fourth Amendment exclusionary rules applied to such cases. *See,* albeit a criminal case, was based on and stressed the Fourth Amendment application to administrative agency subpoenas, not involved in criminal trials.

3. Since the determination below is in accord with the decisions of this Court with respect to the unlawfulness of the search and the exclusion of the evidence obtained thereby, is there any Federal question of substance? Respondent submits there is none.

Petitioner argues as if the Court below had decided that *Mapp* v. *Ohio, supra*, mandated the exclusion of the evidence involved herein. Petitioner however misreads the Court's opinion (Pet. 8A). Though the Court below speaks of the "exclusionary rule of *Mapp* v. *Ohio*", *Mapp* only decided that the protection of the Fourth Amendment was expanded by the Fourteenth Amendment to apply to the States. Thus all Federal law interpreting the Fourth Amendment became part of the State law. *Mapp* mandated only that the exclusionary rules of the Federal law must be applied by the States.

Neither *Mapp* nor any other Federal case prohibited the Court below from extending the exclusionary rules to administrative bodies in the State. In doing so it was free to utilize logic and reasoning from Federal decisions, which it did, to achieve the result reached. That however does not create a Federal question of substance, nor has Petitioner indicated what Federal question arises from the circumstances herein.

Primarily, Petitioner seeks review because of its belief that this case will prevent State agencies from making warrantless inspections, because any evidence found thereby will be excluded, thus rendering the inspection useless. This is not a Federal question, however, but one for the State to solve by providing search warrants or inspections with proper limits within the Fourth Amendment. Petitioner insists, quite indefensibly, that its conduct herein was an

inspection when both Courts below and the administrative hearing officer thought otherwise (Pet. 4A, 14A, note 4). It is therefore obvious that the decision below does not prevent warrantless inspections but only searches and unlimited inspections without any protection whatsoever from arbitrary behaviour of governmental agencies.

Thus Petitioner seeks to uphold its action on the basis that it had statutory authority to make a broad and unlimited inspection, which is not the warrantless inspection mentioned in *See, supra,* 387 U.S. 544, 545, 87 S. Ct. 1740, 18 L. Ed. 2d 947, and was distinguished in *Colonnade Catering Corp.* v. *United States,* 410 F. 2d 197, 2d (2 CCA–1969) which cited one of the decisions herein (Pet. 1A) as an example.

In summary, this case did not involve a challenge to a regulatory normal inspection but to a warrantless search of a coat in non-public premises. The Court below held that the search was unlawful, and the evidence seized excludable. To do so, it extended the exclusionary rules developed under the Fourth Amendment to administrative hearings, not because *Mapp* mandated it, but because the Court, by applying the logic and reason of Federal and other cases could see no sound reason for refusing to do so.

CONCLUSION

The extension of the exclusionary rules of the Fourth Amendment to cover State administrative hearings raises no Federal question, nor is such a determination contrary to the decisions of this Court. The Writ should be denied.

Respectfully submitted,

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